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GULAM WAWASAN SDN BHD v. GOVERNMENT OF MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAJA AHMAD MOHZANUDDIN SHAH JC
[CIVIL SUIT NO: WA-21NCvC-49-08-2019]
15 FEBRUARY 2024

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Abstract – *Section 71 of the Contracts Act 1950 provides that if a party undertakes some kind of work or service for another party without intending to do it free of charge, the person who received such work or service must compensate the person who performs it. It does not require the existence of an underlying contract that governs the relationship between the parties in order for s. 71 to be invoked. This section does not bring into play the question of the privity of contract between the parties. The provision is intended to prevent any unconscionable conduct on the part of the benefitted party which results in the beneficiary gaining unjust enrichment at the expense of the innocent party through unfair means. To accomplish this, the innocent party should be compensated by the benefitted party for the monetary value that had been lost as a result of the benefitted party making use of the innocent party's work or services.*

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CONTRACT: *Agreement – Concession agreement – Quantum meruit – Service provider and city council entered into contract for provision of cleaning services for footways of city – Contract novated following privatisation of management of solid waste and public cleansing – Claim for outstanding sums allegedly due for services rendered by service provider to city council – Expectation of entitlement as compared to what other contractors received under concession agreement – Whether there was privity of contract – Whether there was unfair discrimination – Contracts Act 1950, s. 71*

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TORT: *Misfeasance – Misfeasance and/or nonfeasance in public office – Service provider and city council entered into contract for provision of cleaning services for footways of city – Contract novated following privatisation of management of solid waste and public cleansing – Claim for outstanding sums allegedly due for services rendered by service provider to city council – Whether misfeasance and/or nonfeasance in public office established*

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LOCAL GOVERNMENT: *City council – Service provider and city council entered into contract for provision of cleaning services for footways of city – Contract novated following privatisation of management of solid waste and public cleansing – Claim for outstanding sums allegedly due for services rendered by service provider to city council – Expectation of entitlement as compared to what other contractors received under concession agreement – Whether there was unfair discrimination – Whether there was tort of misfeasance and/or nonfeasance in public office – Solid Waste and Public Cleansing Management Act 2007*

I

The plaintiff was contracted by Dewan Bandaraya Kuala Lumpur ('DBKL') in 2005 to provide cleaning services for the footways of Kuala Lumpur. The contract was extended for a further five years. In 2011, the Solid Waste and Public Cleansing Management Act 2007 ('Act') came into force with the purpose of providing and regulating the management of controlled solid waste and public cleansing with uniform law and policy throughout Peninsular Malaysia and the Federal Territories of Putrajaya and Labuan. With its introduction, the Government of Malaysia ('first defendant') had been conferred with the Executive authority over matters incidental thereto, previously handled by various local authorities. The sixth defendant, a body corporate led by the fifth defendant, entered into a concession with the first defendant and Alam Flora. This concession was granted to Alam Flora by the first defendant. As a result of the privatisation of the management of solid waste and public cleansing in Peninsular Malaysia, the plaintiff's contract with DBKL was novated to Alam Flora. Hence, the present claim by the plaintiff for, *inter alia*, outstanding sums of RM85,356,734.98 allegedly due for services rendered by the plaintiff to the defendants based on the plaintiff's expectation of entitlement as compared to what other contractors received under the Alam Flora contract. The plaintiff's complaint against the defendants consisted of three causes of action, namely claims under: (i) s. 71 of the Contracts Act 1950 ('CA') and/or *quantum meruit* against the first defendant on the ground that the first defendant had ultimately benefitted from the plaintiff's services for which the plaintiff had not been adequately compensated compared to other contractors following the novation of its contract with DBKL to Alam Flora; (ii) unfair discrimination, under art. 8(2) of the Federal Constitution ('FC'), in that it had not been treated equally regarding compensation as compared to other contractors providing similar services; and (iii) the tort of misfeasance and/or nonfeasance in public office against the fourth defendant, which rendered the first defendant vicariously liable for the conduct of the fourth defendant who failed to take a proper, reasonable and expected course of action in addressing the plaintiff's request and appeals for the price increase.

Held (dismissing claim):

(1) The plaintiff was not even a party to the concession agreement which was entered into between the first and sixth defendants and Alam Flora. This demonstrated that not only was there no privity of contract between the plaintiff and the first defendant but the plaintiff's hurdles and obstacles had been compounded further by the fact that it did not fall within the concession agreement's jurisdiction. The plaintiff was a stranger to the terms of the concession agreement. Even if the concession agreement were to be invoked, it specified clearly that such an agreement shall not create a privity of contract between the first

defendant and any other Alam Flora's contractors despite the existence of such an agreement. The defendants, especially, the first defendant, had not engaged in an unconscionable conduct towards the plaintiff that resulted in unjust enrichment by the first defendant. The first to fourth defendants had no relationship whatsoever with the plaintiff. There was no claim under *quantum meruit* that could be made by the plaintiff. As far as the issue of whether the compensation received by the plaintiff was sufficient or not, as alleged by the plaintiff, this was a separate matter which was not covered by s. 71 of the CA. Since there was a contract which governed the plaintiff's relationship with Alam Flora in relation to its services, it could be ruled that s. 71 of the CA applied in this case. It was untenable for the plaintiff to claim that it required no contract in order to file its claim against the first defendant while, at the same time, enjoyed its contract with Alam Flora in which it was and is still being a party and had further been compensated in accordance with the parties' agreement. (paras 32 & 36-38)

(2) The cause of action of unfair discrimination must fail. There was no doubt that the plaintiff entered into a valid and binding contract with Alam Flora on a voluntary basis. Despite some initial concerns, the plaintiff ultimately accepted the letter of award from Alam Flora. This was after being well aware that the pricing for its services remained the same as per its contract with DBKL. The parties had entered into a contract governed by the CA to the exclusion of art. 8(2) of the FC. There had been no infringement of the plaintiff's rights under the FC. This was a matter of personal law governing the contractual relationship between the parties. Not only was there no discrimination but there was also no element of unfairness. (paras 47 & 48)

(3) There could be no misfeasance or nonfeasance in public office on the part of the fourth defendant. The plaintiff did not follow the proper procedure when requesting for an increase in price. It would be legally prudent for the plaintiff to address every issue directly to Alam Flora who will, in turn, deal directly with the sixth defendant. The act of engaging directly with the then Prime Minister while simultaneously bypassing the contract with Alam Flora seemed rather unhealthy; the Prime Minister might not be able to gather sufficient background information regarding the substance and context of the matters that he was considering. Furthermore, even the plaintiff's letters that were brought to the attention of the Prime Minister did not adequately explain the relationship between the parties. (paras 53 & 54)

Case(s) referred to:

Ahmad Tajudin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang [1997] 2 CLJ 225 CA ***(refd)***

Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal [2016] 2 CLJ 563 CA ***(refd)***

Tanjung Teras Sdn Bhd v. Kerajaan Malaysia [2015] 9 CLJ 1002 CA ***(refd)***

Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal [2019] 1 CLJ 365 FC ***(refd)***

Legislation referred to:

Contract Acts 1950, s. 71

Federal Constitution, art. 8(2)

For the plaintiff - Tommy Thomas, Muhammad Azrul Abdul Hamid & Michael Yap Chih Hong; M/s Azrul, Liew & Co

For the 1st, 2nd, 3rd & 4th defendants - Nik Mohd Nor Nik Kar & Mohd Izhanuddin Alias; SFCs & Arina Azmin Ahmad Marzuki & Adiba Iman Md Hassan; FCs

For the 5th & 6th defendants - Hairul Azam Hambali; M/s Azam Lim & Pang

Reported by Najib Tamby

JUDGMENT

Raja Ahmad Mohzanuddin Shah JC:

Preliminary

[1] There can never be an underestimation of the role of the plaintiff. The nature of the services provided by this type of entity is essential for every city worldwide. This entity is charged with the responsibility of cleaning the footways in the Federal Territory of Kuala Lumpur.

[2] The plaintiff claims, however, that the Government of Malaysia did not adequately acknowledge the plaintiff's role when its contract with Dewan Bandaraya Kuala Lumpur ("DBKL") was novated over to a new concessionaire, Alam Flora Sdn Bhd ("Alam Flora") as well as the consequence that follow. This was a result of the Government of Malaysia's initiative to privatise the management of solid waste and public cleansing in Peninsular Malaysia.

[3] According to the plaintiff, all other contractors received a price increase following the implementation of the Solid Waste and Public Cleansing Management Act 2007 ("Act 672"). The plaintiff, however, received none. This is allegedly due to the fact that the plaintiff's cleaning services are not part of the concession agreement signed between the relevant parties, to which the plaintiff is not a party.

[4] This resulted in the plaintiff being paid at the same rate as when it first began in 2005. Thus, the plaintiff appealed to many parties, including the then Prime Minister of Malaysia himself, who agreed to such a price increase. However, this had not been acted upon by the Malaysian government, thus this civil action.

[5] Therefore, the plaintiff is claiming, amongst others, RM85,356,734.98 as the outstanding sums allegedly due for services rendered by the plaintiff to the defendants based on the plaintiff's expectation of entitlement as compared to what other contractors receive under the Alam Flora contract.

An Overview Of The Background Facts

[6] As a result of a letter of award dated 15 April 2005, the plaintiff was contracted by DBKL to provide cleaning services for the footways of Kuala Lumpur. This occurred prior to the enactment of the Act 672.

[7] Accordingly, the plaintiff was required to clean Jalan Raja Laut, Jalan Bunus and Jalan Ara for 15 times per month at a monthly rate of RM3.20 per square metre (RM0.21 per time per square metre) as well as Lorong Gombak, Jalan Masjid India, Jalan Melaka, Jalan Munshi Abdullah and Jalan Raja for ten times per month at a monthly rate of RM2.50 per square metre (RM0.25 per time per square metre).

[8] On 14 November 2007, the Economic Planning Unit of the Prime Minister's Department ("EPU") informed DBKL that it had decided to extend the contract with the plaintiff for a further five years.

[9] On 1 September 2011, the Act 672 came into force with the purpose of providing and regulating the management of controlled solid waste and public cleansing with uniform law and policy throughout Peninsular Malaysia and the Federal Territories of Putrajaya and Labuan. With its introduction, the Government of Malaysia being the first defendant has been conferred with executive authority over matters incidental thereto, previously handled by various local authorities.

[10] As a result of this, solid waste and public cleansing management became the responsibilities of the Ministry of Housing and Local Government, the second defendant. At the relevant time, the fourth defendant served as the secretary general of the second defendant.

[11] The Act 672 requires that the Minister of Housing and Local Government appoints a Director General of Solid Waste and Public Cleansing Management, who shall lead a department responsible for carrying out the Director General's functions. The third defendant is this department.

[12] The sixth defendant is a body corporate established under the Act 672. It is led by a Chief Executive Officer, who is the fifth defendant. The second defendant is also responsible for overseeing the sixth defendant.

[13] Consequently, the first defendant, the sixth defendant and Alam Flora entered into a concession agreement on 19 September 2011 ("concession agreement"). This concession was granted to Alam Flora by the first defendant.

[14] As a result of the privatisation of the management of solid waste and public cleansing in Peninsular Malaysia, the plaintiff's contract with DBKL was then novated to Alam Flora.

Issues Before The Court

[15] The plaintiff's complaint against the defendants consists of three causes of action. Firstly, a claim under s. 71 of the Contracts Act 1950 and/or *quantum meruit* against the first defendant on the ground that the first defendant had ultimately benefited from the plaintiff's services for which the plaintiff has not been adequately compensated compared to other contractors following the novation of its contract with DBKL to Alam Flora. Second, the plaintiff's claim of unfair discrimination is based on its cause of action under art. 8(2) of the Federal Constitution in that it has not been treated equally regarding compensation as compared to other contractors providing similar services. Third, it filed a claim under the tort of misfeasance and/or nonfeasance in public office against the fourth defendant, which renders the first defendant vicariously liable for the conduct of the fourth defendant, who failed to take a proper, reasonable and expected course of action in addressing the plaintiff's requests and appeals for the price increase.

[16] This being the case, the plaintiff now seeks the following relief against the defendants on a joint and several basis or on an alternative liability basis:

(i) the defendants, whether jointly or severally, shall pay the outstanding amount of RM85,356,734.98, the outstanding balance of all the amounts owing for the services rendered by the plaintiff to the defendants or any of them from the date of this suit until judgment or such sum as the court deems fit;

(ii) in the alternative to para. (a) above, the defendants, whether jointly or severally, shall pay the outstanding amount of RM62,129,038.53, the outstanding balance of all the amounts owing for the services rendered by the plaintiff to the defendants or any of them from the date of this suit until judgment or such sum as the court deems fit;

(iii) as a further alternative to paras. (a) and (b) above, compensation for a sum that the court deems fit and just in accordance with s. 71 of the Contracts Act 1950;

(iv) interest in accordance with the Rules of Court 2012, the terms in the relevant letters or such other rate or period as the court may deem appropriate;

(v) general damages;

(vi) exemplary damages;

(vii) costs; and

(viii) further and/or other relief as the court may deem fit and just.

Court's Analysis And Findings

Section 71 of the Contracts Act 1950 And/Or Quantum Meruit

[17] For the purpose of resolving this dispute between the parties, my first step will be to address the plaintiff's cause of action under s. 71 of the Contracts Act 1950. As set forth in s. 71 of the Contracts Act 1950:

> 71. Obligation of person enjoying benefit of non-gratuitous act
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> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[18] In accordance with s. 71 of the Contracts Act 1950, if a party undertakes some kind of work or service for another party without intending to do it free of charge, the person who receives such work or service must compensate the person who performed it. The fundamental factor governing this section is that it does not require the existence of an underlying contract that governs the relationship between the parties in order for this section to be invoked.

[19] This being the case, this section does not seem to bring into play the question of the privity of contract between the parties. This provision is intended to prevent any unconscionable conduct on the part of the benefitted party which results in the beneficiary gaining unjust enrichment at the expense of the innocent party through unfair means. In order to accomplish this, the innocent party should be compensated by the benefitted party for the monetary value that has been lost as a result of the benefitted party making use of the innocent party's work or services.

[20] It is to be noted that in this case, the plaintiff is arguing that the first defendant is not immune from a claim brought under s. 71 of the Contracts Acts 1950 by a party with whom it has no contract, which is the plaintiff. On the basis of the circumstances of this case as they have been presented to the court, the plaintiff argues that it has proven its claim under this section as well as *quantum meruit* against the defendants.

[21] As a matter of reference, the plaintiff referred to the Court of Appeal case of *Tanjung Teras Sdn Bhd v. Kerajaan Malaysia* [2015] 9 CLJ 1002; [2015] MLRAU 468 in which there was a question regarding whether the Government of Malaysia, being the plaintiff, is legally required to pay Tanjung Teras for the work completed on the project as a subcontractor, despite the fact that Tanjung Teras and the Government of Malaysia have no contractual relationship. The reason for this is that due to the contractual relationship between the main contractor and the Government of Malaysia, any claim for payment for work performed under this project should be made

by the main contractor and not by Tanjung Teras. Her Ladyship Lim Yee Lan JCA observed the following in holding that the Government of Malaysia was liable for the work done by Tanjung Teras:

> [31] Section 71 is the statutory embodiment of the common law principle of *Quantum Meruit*, which provides for a just compensation as the measure of the work done as opposed to contractual damages (see: *Siow Wong Fatt, CravenEllis v. Cannons Ltd* [1936] 2 KB 403; *Delpuri-Harl Corp JV Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor* [2014] MLRAU 314; *Spatial Ventures Sdn Bhd v. Twintech Holdings Sdn Bhd* [2013] MLRHU 512; [2014] 8 MLJ 38).
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> [32] Liability under s. 71 is not based on any existing contract between the parties. Rather it is based on the equitable principle of conscionable conduct and restitution to prevent unjust enrichment by one party at the expense of another party (see: *Ramkrishna Shankarrao v. Rangoobai and anr* AIR 1959 Bom 519; (1958) 60 BOMLR 459, *Abu Mohammed v. Mohammed Kunju Lebba* (1995) DMC 316 and *Pallonjee Eduljee and Sons v. the Lonavala City Municipality* AIR 1937 Bom 417; (1937) 39 BOMLR 835).
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> ...
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> [38] In the light of the decided authorities cited above on the jurisdic basis behind s 71 of our Contracts Act, it is thus clear that the learned SFC's submission that there is no obligation on the part of the plaintiff to pay the defendant for the super structure work done because there was no privity of contract between the parties does not hold any water.

...

> [46] Coming back to the case before us, the factual scenario is very different from Siow Wong Fatt. The facts here were that (1) the project was built for and on behalf of the plaintiff to be used as the staff quarters of JBDPAN; (2) the project was undertaken by JP for the plaintiff under the agreement for which JP had expected to be paid under the agreement; (3) the super structure work was part of the works under the project; (4) JP had appointed the defendant as its sub-contractor to construct the super structure work; (5) the defendant had certainly expected to be paid for the super structure work by JP on a back-to-back basis.
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> [47] Having regard to the juristic basis behind s 71 which is premised on the equitable principle of restitution, good conscience and prevention of unjustment (*sic*) enrichment, we hold as a matter of fact that at the time the super structure work was done by the defendant, it was done for the plaintiff as the ultimate owner of the project and the plaintiff was the direct beneficiary of the project. The defendant had intended to be paid for carrying the works. The fact that the defendant would receive payment from JP and not the plaintiff did not alter the fact that the defendant never intended the work to be done gratuitously. The second condition ought to have been found in favour of the defendant.

A [48] We now come to the fourth condition. In this regard, we are again of the view that the learned High Court Judge erred in holding that as the whole project was not completed and the plaintiff had to appoint a new contractor to complete the project, the plaintiff had not benefited from the defendant's work.

B [49] It must be borne in mind that the defendant was only appointed as a subcontractor to construct the super structure work while the construction of the entire project was the responsibility of JP.

...

C [52] Consequently, we agree with the defendant's learned counsel that the plaintiff could not deny that it had benefited from the super structure work done by the defendant. It would therefore be unjust for the plaintiff to refuse to pg 18 *Tanjung Teras Sdn Bhd v. Kerajaan Malaysia* [2015] MLRAU 468 pay any compensation to the defendant for the value of the super structure work done by the defendant.

D [53] In conclusion, based on the foregoing discussions, we agree with the defendant that it had successfully proven, on a balance of probabilities, its claim under s. 71 to the Contracts Act.

[22] As I analyse the issue before me, I am of the opinion that under the circumstances of this case, it is conclusive that the plaintiff does not carry E out its work for free and, therefore, is entitled to compensation for all the work and services that the plaintiff has performed throughout the entire process. However, in order to properly evaluate the plaintiff's claim under this provision, a number of crucial questions immediately come to mind. These questions are outlined in the following paragraphs.

F **[23]** As a first question, has the plaintiff received compensation for the work and services that it has performed and is continuing to perform? The second question that comes to mind is under what legal relationship does the plaintiff have the right to receive such compensation for the work it has undertaken? Thirdly, it is important to consider who benefited from the G plaintiff's work and services. In conclusion, the fourth and final question I will be considering after having examined the three questions that I posed earlier is whether there is any evidence that the defendants, in particular the first defendant, have engaged in unconscionable conduct towards the plaintiff which has led to unjust enrichment on the part of the first defendant.

H **[24]** Regarding the first question, which is whether or not the plaintiff has been compensated for the work and services that it has performed, I find that the answer is in the affirmative. It is evident from the facts before me that this is not a case where the plaintiff has performed its part of the bargain, but then is not being compensated for the work it has done. As a matter of fact, I the plaintiff has been compensated accordingly.

[25] Initially, the plaintiff did not agree to the novation of its contract with DBKL to Alam Flora. Various negotiations then occurred involving the plaintiff and Alam Flora between 1 September 2011 and 10 October 2012. As a result, DBKL continued to make payments on behalf of the sixth defendant to the plaintiff since the novation of the contract to Alam Flora had not yet taken place.

[26] Following this, Alam Flora informed the sixth defendant by letter dated 10 October 2012 that it had signed a letter of award with the plaintiff for the purpose of cleaning footways in Kuala Lumpur for a period of two plus five years. According to the letter of award, the plaintiff was to be compensated RM549,877.77 per month for its services. The fee was still calculated based on the previous rate as stipulated in the contract with DBKL. The letter of award, however, provides that the fee may be revised upward or downward from time to time if the location areas or the concession agreement are changed. To this end, the plaintiff was so unfortunate that the new contract with Alam Flora did not result in a price increase for its services, even though all contractors novated pursuant to the concession agreement received price increases.

[27] In relation to the price increase involving other contractors, the plaintiff argues that the sixth defendant allegedly agreed with the monthly rate of RM1.77 per square metre proposed by another contractor responsible for cleaning the new footways in Putrajaya. Afterwards, Alam Flora allegedly recommended to the sixth defendant that the proposed rate for the footway cleaning work in Putrajaya be fixed at RM2.08 per time per square metre. No indication herein that this was to be agreed upon only after it had been approved by the Cabinet of Ministers.

[28] Based on the analysis of the earlier facts, I find that the plaintiff had been paid and even continues to be paid the sum of RM549,877.77 per month based on the existing rate of RM0.21 per square metre per time or RM0.25 per square metre per time, depending on the exact location at which services are rendered. As a result, there is no longer any doubt as to whether the plaintiff performed the work for free or not since it has nonetheless received compensation in accordance with such work performed, even if it is allegedly at a loss.

[29] The second question that arises is under what legal relationship the plaintiff is entitled to receive such compensation for the work rendered. In this case, it becomes necessary to examine whether the plaintiff received these payments directly from the first defendant, on an independent basis and without any involvement of any contract, or whether they were made under a valid contract not involving the first defendant. Despite the fact that I am aware that the plaintiff is arguing that the existence of a contract is not necessary to establish the relationship between the parties, it nevertheless

becomes necessary, given the surrounding circumstances of this case, that there be a determination that the plaintiff has no direct and legal relationship with the first defendant. As a matter of fact, the only relationship that governs the plaintiff is the agreement between the plaintiff and Alam Flora as set forth in the letter of award. This letter of award establishes the relationship between the plaintiff and Alam Flora in a way that is independent of the participation of the first defendant keeping in mind as well that there was no contract between the plaintiff and the first defendant in the first place. As a result, I find that as a matter of law, the existence of a contract negates the right to bring a claim under s. 71 of the Contracts Act 1950.

[30] On the subject of the agreement between the plaintiff and Alam Flora, it would appear to me that there is no outstanding payment owed by Alam Flora to the plaintiff based on the evidence presented to me. At the time of trial, all payments were up to date as far as I am aware. Moreover, it is not even a case where Alam Flora has retained the plaintiff's entitlement under their contract. As far as the plaintiff is concerned, whatever it deserved under the contract has been paid to it. It probably would have been a different story if the plaintiff had not been paid for the work that it had done in the first place. In the case before me, the value of the services rendered by the plaintiff has been compensated in the manner in which they were rendered.

[31] There is a third question which relates to the fact that who has benefited from the plaintiffs work in this case. Is it legally the first defendant that allegedly benefitted from the plaintiff's services in accordance with the plaintiff's claim for *quantum meruit* or is it Alam Flora in accordance with the letter of award it entered into with the plaintiff? As a way to determine which party has legally benefited under the contract in which the plaintiff has been providing its services, it becomes necessary to examine the governing contractual relationship under which the plaintiff is a party and with whom it rightfully obtains payments. Considering the analysis carried out earlier, it appears that a contract existed only between the plaintiff and Alam Flora and no one else. It should be noted that the immediate party that benefited from the plaintiff's work is legally Alam Flora and this is based on the letter of award that the parties have entered into and therefore it is impossible that the first defendant has been unjustly enriched in any way as suggested by the plaintiff. This is particularly true when Alam Flora, after receiving such a benefit as a result of the work performed by the plaintiff, is further entitled to charge the first defendant and/or the sixth defendant something in the range of RM610,975.31 per month in recognition of its involvement as part of the contract with the plaintiff. This is in stark contrast to the earlier contract between DBKL and the plaintiff by which DBKL was the immediate beneficiary of the plaintiff's services. In the case at hand, the plaintiff has been compensated for services rendered and has been given the compensation it deserved, which it has voluntarily and willingly accepted.

[32] However, that is not all. Adding further complexity to the plaintiff's position is the fact that the plaintiff is not even a party to the concession agreement which was entered into between the first defendant, the sixth defendant and Alam Flora on 19 September 2011. In my opinion, this demonstrates that not only was there no privity of contract between the plaintiff and the first defendant if one were to look at it from that perspective but the plaintiff's hurdles and obstacles have been compounded further by the fact that it did not fall within the concession agreement's jurisdiction. From the point of view of this court, it is fair to say that the plaintiff is a stranger to the terms of the concession agreement. It should be noted that even if the concession agreement were to be invoked, it specifies clearly that such an agreement shall not create a privity of contract between the first defendant and any other Alam Flora's contractors despite the existence of such an agreement.

[33] Toward this end, I find guidance in the decision of the Court of Appeal in *Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal* [2016] 2 CLJ 563 where His Lordship Mohd Zawawi Salleh JCA (as His Lordship then was) held that the plaintiff's claim for *quantum meruit* would not succeed due to the existence of an existing contractual relationship between the parties. His Lordship makes the following observation at pp. 577 & 578:

> *Quantum Meruit*
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> [51] In the alternative, the plaintiff submitted that it had executed the works for the first defendant and the defendant had enjoyed the benefit of the act of the plaintiff. Therefore, the plaintiff was entitled to claim from the first defendant for the said sum on the *quantum meruit* basis.
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> [52] The learned JC held that the plaintiff was entitled to claim from the first defendant for the sum of RM200.000.
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> [53] We disagree with the findings of the learned JC. We held that there was a binding contract between the plaintiff and the first defendant. Exhibit P1 (letter of offer) outlined the terms of the contract between the first defendant and the plaintiff, *inter alia*, the contract price for resuming and completing the remaining project work was RM3,031,151.80.
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> [54] We were of the opinion that the plaintiffs claim for *quantum meruit* would not succeed since there was an existing contract between the parties. In New South Wales in *Trimis v. Mina* [2000] 2 TCLR 364, the general principle was stated by Mason P as follows:
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> > No action can be brought for restitution while an inconsistent contractual promise subsists between the parties in relation to the subject-matter of the claim. This is not a remnant of the now discarded implied contract theory of restitution. The proposition is not based on the inability to imply a contract, but on the fact that the benefit provided by the plaintiff to the defendant was rendered

A in the performance of a valid legal duty. Restitution respects the sanctity of the transaction, and the subsisting contractual regime chosen by the parties as the framework for settling disputes. This ensures that the law does not countenance two conflicting sets of legal obligations subsisting concurrently. If there is a valid and enforceable agreement governing the Claimant's right to payment, there is neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration,

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[34] In this regard, it is imperative to note that merging all parties into a single relationship would lead to significant complications. Legal C relationships between all relevant parties are best understood when divided into two categories. The first involves the parties to the concession agreement, and the second pertains to Alam Flora and its respective contractors. This clear distinction is vital to prevent any potential chaos in the implementation of the concession agreement.

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[35] Additionally, in order for me to be able to accept the plaintiff's argument, I would have to lift the corporate veil or, at the very least, venture to look at the parties from another vantage point regarding their relationship with one another. Taking into consideration the factual and legal circumstances that I have just discussed earlier, I am not required to look E behind another layer of the legal curtain in order to identify the relevant parties that are a part of this whole affair. In other words, the relationship between the parties should be able to stop at the plaintiff and Alam Flora's letter of award stage without the necessity of lifting the corporate veil, which is also irrelevant since the relationship between the other parties should have F already existed before the letter of award was issued. In this regard, the concession agreement was entered into on 19 September 2011, whereas the letter of award was only entered into between the plaintiff and Alam Flora sometime in October 2012, though it had been backdated to 1 September 2011.

G **[36]** After analysing the first three questions posed on this issue and in answering the fourth question, I do not think that the defendants, especially the first defendant, have engaged in unconscionable conduct towards the plaintiff that resulted in unjust enrichment by the first defendant. From what I have been able to gather from the evidence, it appears to me that the first H to fourth defendants have no relationship whatsoever with the plaintiff. It is, therefore, clear to me that the court would be setting a dangerous precedent if it accepted the plaintiff's argument since it would open the door to a flood of cases arguing that every contract done by a third-party contractor can be argued to have benefited the first defendant as the end recipient.

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[37] Due to this, all of the authorities relied upon by the plaintiff can be clearly distinguished. There is, therefore, no claim under *quantum meruit* that can be made by the plaintiff. As far as the issue of whether the compensation received by the plaintiff is sufficient or not, as alleged by the plaintiff, this is a separate matter which is not covered by s. 71 of the Contract Acts 1950.

[38] Taking this further, since it seems that there is a contract which governs the plaintiff's relationship with Alam Flora in relation to its services, it cannot be ruled that s. 71 of the Contracts Act 1950 applies in this case. In my opinion, it is untenable for the plaintiff to claim that it requires no contract in order to file its claim against the first defendant, while at the same time enjoying its contract with Alam Flora in which it was and is still being a party and has further been compensated in accordance with the parties' agreement. As inconvenient as it might sound but in no way undermining the plaintiff, it only takes one party to withdraw from the contract if one is unsatisfied with the result. There is, however, no such instance in this case. Apparently, the plaintiff entered into the contract with Alam Flora voluntarily and has been in the contract ever since. There is no evidence in this case that the plaintiff has suffered any loss as a result of this business activity. In fact, the plaintiff is continuing to carry out the contract as it stands. It follows, therefore, that the plaintiff would not be in a position to make comparisons with other contractors within the scope of the concession agreement if the plaintiff does not fall within the scope of the concession agreement in the first place.

[39] I further find that based on the facts before me, there does not appear to be any element that requires restitution to be made. In my opinion, I do not believe that any rights are being wrongfully taken or retained to the point that they need to be restored as a result of the wrongdoing. Basically, the plaintiff has been compensated in accordance with the agreement that it had voluntarily entered into with Alam Flora. In this case, there is nothing to be compensated for as the plaintiff has not suffered any loss in light of such a contract. As a matter of fact, Alam Flora has not even committed any breach of the contract that was entered into with the plaintiff.

[40] At this point, I would like to address the defendants' argument that the plaintiff's services do not fall within the scope of the concession agreement. The fourth defendant, DW1, testified that it is necessary to distinguish the plaintiff's job scope under its contract with Alam Flora from the job scope of the other contractors under the concession agreement. As indicated further by DW1, the plaintiff performed cleaning in the context of sweeping the footways rather than public cleansing as provided for in the concession agreement. Reviewing the concession agreement, it appears that the cleaning of the footways does not appear to fall within the scope of work specified in Appendix V. The closest fitting category that the plaintiff's services could

potentially fall into is under the definition of 'cleansing of public roads'. However, upon closer inspection, this category only includes protocol roads, main/commercial roads, industrial roads, residential roads, pedestrian bridges, flyovers and tunnels.

[41] Regardless of the situation described above, it is important to note that the defendants' positions on this issue have been consistent for quite some time, even before the issue became contentious. This was also acknowledged by the third defendant in its letter of approval of the price rate dated 1 August 2014.

[42] The analysis of all of these factors leads to the conclusion that if any issue arises regarding the alleged necessity for an increase in price, then it must follow the correct procedure in place. It is imperative that this be done pursuant to the contract that governs the relationship between the parties. Therefore, any increase in the price must be made by Alam Flora, as it is the rightful party to receive and address the plaintiff's grievances regarding the price increase.

[43] With regard to the letter dated 15 October 2014 issued by the third defendant approving the increase of the price rate for the plaintiff, it has to be noted that the letter, insofar as its existence is concerned, does not bind the defendants in any way. The reason for this is, first of all, that it is an internal document that was issued by the third defendant to the sixth defendant and it is not intended to be addressed to or made available to the plaintiff. As a result, they can still reverse their decisions based on a specific reason such as a legal challenge. They are well within their rights to do so as long as the plaintiff is not the intended recipient of the communication. As far as those parties are concerned, the letter was not addressed to the plaintiff in any way. A further justification for this may be found in the fact that the Director General of the third defendant has no authority to approve any price rate increase, as opposed to the Secretary General, who is the Ministry Controlling Officer. Having said that, I am aware of the fact that the ability to place the first defendant at risk of exposure to hundreds of millions of ringgits should not be placed in the hands of the Director-General of a government department, as he could cause the government to be exposed to significant losses. In addition to this, the issue needs to be viewed from the perspective that there was no privity or nexus between the plaintiff and the third defendant, or for that matter all of the defendants taken together. Hence, in light of the fact that the plaintiff is a total stranger to the first defendant, any argument based on this letter is without merit. Similarly, even if there was a promise to increase the rate as allegedly made by PW5, who was the Chief Executive Officer of Alam Flora at the time of the material event, the defendants should not be bound by that promise, even if it exists. If this scenario were to occur, it seems that the cause of action probably lies against Alam Flora rather than the defendants in this case as far as proximity is concerned.

Unfair Discrimination

[44] Article 8(2) of the Federal Constitution prohibits unfair discrimination. As it stands, it reads as follows:

> Equality
>
> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

[45] The law on unfair discrimination has been authoritatively established in the Court of Appeal case of *Ahmad Tajudin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* [1997] 2 CLJ 225; [1997] 1 MLJ 241 in which His Lordship Abdul Malek Ahmad JCA (as His Lordship then was) provided the necessary ingredients for a litigant to succeed in a claim for unfair discrimination. The following is His Lordship's analysis and opinion on this issue at pp. 257 & 258:

> In our judgment, for unfair discrimination to be actionable, the following elements must be proved to exist:
>
> (a) there must be some form of discrimination;
>
> (b) the discrimination must be unfair; and
>
> (c) there must be resultant harm or injury.
>
> Taking the first ingredient, a plaintiff, in order to succeed in an action for unfair discrimination, must establish that discrimination was practised upon him. Generally speaking, discrimination usually occurs when equals are treated unequally or when unequals are treated equally. See *All India Sainik Schools Employees Association v. The Defence Minister-cum-Chairman, Board of Governors, Sainik School Society, New Delhi & Ors* AIR 1989 SC 88 at p 92. However, it all depends upon the facts of a given case. It is the conduct of the defendant towards the particular plaintiff that calls for attention and not particular acts or omissions. But this statement must not be taken too far. For, cases may occur where a single act or omission on the part of the defendant may have a continuing discriminatory effect upon the plaintiff. Take the case of promotions in the sphere of employment. If a plaintiffs promotion is withheld while another who is similarly circumstanced is promoted, it is but one act, or more appropriately, one omission. Nevertheless, it has a discriminatory effect upon the plaintiff. Whether discrimination was practised in a particular case is a question of fact depending upon the facts and circumstances of the given case. See *Indian Oil Corp Ltd v. Premier Road Carriers Ltd* AIR 1983 Cal 445.

A Discrimination *per se* is not actionable unless it is also unfair, and this brings us to the second ingredient. To be actionable, discrimination must be accompanied by an element of harshness or unfairness. In other words, there must be unjust or unreasonable or unfair bias in favour of one and against another. See *Dost Mohammad v. Union of India* 1981 Lab IC 1210 *Ranbir Singh v. Chief Commercial Superintendent* AIR 1961 Punj 268.
B Generally speaking, there must be a rational nexus between the conduct complained of as amounting to discrimination and the object that is sought to be achieved by it. That nexus may be based on sociological or economic or cultural considerations. But the reference to the existence of such a nexus is merely a guide. At the end of the day, an objective assessment of the facts of a particular case should leave the court with
C the impression that a plaintiff has received harsh, unreasonable or unfair treatment in the hands of the defendant.

The third ingredient of the wrong is damage. One who claims to have suffered unfair discrimination in the hands of another cannot succeed unless he is able to demonstrate that he has suffered some injury
D recognized by law. The injury may take the form of pecuniary loss. Or it may be non-pecuniary, such as injury to reputation or to property or to livelihood. So long as there is some injury which the law recognizes, the third requirement is met.

[46] In relation to the issue of unfair discrimination, it is the plaintiff's
E contention that it should not be discriminated against as compared to other contractors who provide similar cleaning services to the public but who are compensated at a higher rate than the plaintiff for their work. In addition, the plaintiff claims that this type of discrimination was unfair and resulted in harm to the plaintiff.

F **[47]** In light of the earlier findings in this case, I find that this cause of action must also fail. There is no doubt that the plaintiff entered into a valid and binding contract with Alam Flora on a voluntary basis. Despite some initial concerns, the plaintiff ultimately accepted the letter of award from Alam Flora. This was after being well aware that the pricing for its services
G remained the same as per its contract with DBKL. The parties have, in any event, entered into a contract governed by the Contracts Act 1950 to the exclusion of art. 8(2) of the Federal Constitution. There has been no infringement of the plaintiff's rights under the Federal Constitution. This is rather a matter of personal law governing the contractual relationship
H between the parties.

[48] Upon reviewing further the facts before this court, I find that not only is there no discrimination, but also no element of unfairness. As evidenced by its conduct, the plaintiff appears comfortable with the rates it receives, though it can be assumed that a little more would increase profits. PW1, as
I the plaintiff's Managing Director, made it clear that the plaintiff is bound by the terms of the contract that it entered into with Alam Flora, even though he was fully aware that the plaintiff had the option of withdrawing from

entering into the agreement with Alam Flora. Despite the plaintiff taking over a year to decide to sign the letter of award, the plaintiff voluntarily signed the letter of award.

[49] Additionally, there would be another issue arising from the fact that, if I were to permit this type of claim when the plaintiff was not even privy to the first defendant, I would cause a floodgate through which all unsatisfied parties would start comparing notes and bringing lawsuits under this provision of the Federal Constitution. There are some aspects of business dealing that should be left as a free market for all business ventures, as long as they are subject to healthy competition.

Misfeasance And/Or Nonfeasance In Public Office

[50] As for the issue of misfeasance and/or nonfeasance in public office, in which case the first defendant will be held vicariously liable for the fourth defendant's actions, the plaintiff asserts that there is a deliberate failure on the part of the fourth defendant to perform his statutory duties, as he acted either with the intention of harming the plaintiff or with reckless indifference to the probability that the plaintiff would be harmed. It is the plaintiff's case that the fourth defendant knew that the plaintiff was the only contractor who did not receive a price increase as a result of him being involved in numerous meetings and correspondence, in addition to being briefed by his officers on a variety of matters relating to this issue. Consequently, it is disingenuous for the fourth defendant to say that he is not aware of the fact that the plaintiff has not received any price increase under the terms of the contract with Alam Flora and the fact that the plaintiff's performance has remained the same, whether prior to or after the novation. The plaintiff further states that the fourth defendant also failed to investigate the fact that the plaintiff was being unfairly treated compared to other contractors in terms of the pricing of its services, despite the fact that it was the duty of the fourth defendant to investigate the matter. Additionally, the fourth defendant was alleged to have failed to follow the instructions of the former Prime Minister, YAB Dato' Sri Mohammad Najib bin Tun Haji Abdul Razak ("Prime Minister Najib Razak") who was also the Minister of Finance in charge of the Federation's financial affairs at the time. As a matter of fact, it has also been alleged that the fourth defendant is also subject to the instructions of the Minister of Finance in his capacity as the controlling officer of the second defendant's ministry.

[51] It should be noted at this juncture that there were several letters written by the plaintiff that were minuted by Prime Minister Najib Razak in relation to this issue. The first was a letter dated 17 January 2013 sent by the plaintiff to the second defendant's Secretary General and the Chief Executive Officer of the sixth defendant with the words "Untuk pertimbangan" written on 16 January 2013. This letter, containing such a minute by the Prime Minister, was forwarded by the Minister of Finance's

political secretary in his letter dated 17 January 2013 to the second defendant's secretary general for his attention and further action. The second instruction from the Prime Minister came in the form of his minute on the plaintiff's letter dated 4 November 2013 addressed to the Minister of Urban Wellbeing, Housing and Local Government with the words "Untuk pertimbangan" written on 4 November 2013. The Minister of Finance's senior private secretary issued another letter on 4 November 2014 to the Minister of Urban Wellbeing, Housing and Local Government, enclosing the plaintiff's letter to the sixth defendant for his attention and action. In a follow up letter to the Minister of Urban Wellbeing, Housing and Local Government, the Prime Minister wrote a minute on the third defendant's letter dated 17 November 2014 with the caption: 'YB Datuk Rahman Dahlan, untuk diselesaikan rayuan ini'. It does not end there, however. In a letter dated 20 October 2015, the Prime Minister's Political Secretary wrote to the fourth defendant with the following notes by the Prime Minister: 'YBhg Datuk Mohammad Mentek, untuk dilaksanakan pembayaran harga baru mulai September 2012, seperti syarikat-syarikat lain'. There is more to this. Another letter was sent by the Prime Minister through his Principal Private Secretary's letter dated 23 March 2017 to the then Minister of Urban Wellbeing, Housing and Local Government, YB Tan Sri Noh Omar, in which he forwarded the plaintiff's letter dated 7 March 2017. In addition to this, there was a final note from the Prime Minister dated 18 April 2018, which was minuted in the plaintiff's letter dated 30 March 2018 to the Prime Minister and the fourth defendant with the following remarks: 'YBhg Datuk Mohammad Mentek, Diluluskan (illegible) harga baru, ikut harga (illegible) syarikat-syarikat lain. Tidak perlu bawa Jemaah Menteri'.

[52] My first step in analysing this issue is to equip myself with the law governing misfeasance in public office. In this regard, the Federal Court decision made available *via* the judgment of Her Ladyship Nallini Pathmanathan FCJ in *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2019] 1 CLJ 365; [2019] 12 MLJ 1, which specifies the elements of the tort of misfeasance in public office provides considerable guidance on this subject. Her Ladyship identifies these elements as follows at pp. 384-385 (CLJ); p 47 (MLJ):

> The law relating to the tort of misfeasance in public office
>
> [182] The tort relates to deliberate dishonest conduct and abuse of power by a public officer. As stated in Three Rivers (per Lord Steyn) the rationale underlying the tort is that 'in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes ...'.
>
> [183] The quintessence of the rule of law is that no man is above the law and that all men are equal before the law. This tort therefore serves to protect citizens against abuse of power by public officials. To that extent it is distinctive in that it combines both public and private law elements, unlike other torts which are wholly private in nature.

[184] The key ingredients of the tort are:

(i) an abuse of public power or authority;

(ii) by a public officer;

(iii) who either: (a) knew that he was abusing his public power or authority; or (b) was recklessly indifferent as to the limits of their public power or authority; and

(iv) who acted or omitted to act either with: (a) the intention of harming the plaintiff (targeted malice); or (b) with the knowledge of the probability of harming the plaintiff, or with reckless indifference to the probability of harming the plaintiff or a class of persons of which the plaintiff was one.

[185] It is therefore an intentional tort. The element which receives the most emphasis is that of bad faith, ie the abuse of power and the targeted malice or the complete indifference to the effect of the abuse of power on the plaintiff or a class of such persons. It is also the element which makes this tort hard to plead and to prove as it is only in rare circumstances that such facts subsist as would allow the plea to remain on the record. In many instances the plea is struck out as it is simply insufficient. This is because it is not every act or omission on the part of a public officer which lends itself to the bringing of an action premised on this tort. It requires outrageous conduct with the requisite intention to injure and this serves as a safeguard to preclude a multitude of actions from being initiated.

[53] I will now proceed to address this issue. An in-depth examination of this subject has led me to conclude that there can be no misfeasance or nonfeasance in public office on the part of the fourth defendant. To my mind, the plaintiff did not follow the proper procedure when requesting an increase in price. After identifying the parties involved and their nexus, it appears that it would be legally prudent for the plaintiff to address every issue directly to Alam Flora, who will, in turn, deal directly with the sixth defendant.

[54] It is in fact true that it was actually the plaintiff who first attempted to create a special relationship by writing to the Prime Minister and to other Ministers regarding this issue of the price increase in light of the plaintiff's complaint that it had not been compensated well and equally. From the perspective of the facts that I have outlined earlier, the act of engaging directly with the Prime Minister while simultaneously bypassing the contract with Alam Flora seems to be rather "unhealthy" in this respect. This is due to the fact that the Prime Minister might not be able to gather sufficient background information regarding the substance and context of the matters that he was considering. Furthermore, even the plaintiff's letters that were brought to the attention of the Prime Minister did not adequately explain the relationship between the parties. Therefore, it is possible that the Prime

Minister was unaware of the full terms and conditions of the contract or the layers of relationship between the parties when he wrote the minutes on those letters. Moreover, those involved in the dispute are not privy to each other's contracts.

[55] Further to what I have discussed earlier, I find that failing to comply with the Prime Minister's directive in so far as the specific facts of this case are concerned does not implicate the fourth defendant in the manner that the plaintiff was trying to portray. It is essential to note that there were no delays or inaction on the part of the fourth defendant, given that the plaintiff never took a proper channel in the first place in order to voice its grievances. It goes without saying that there is a need for parties herein to always return to the position of the relationship between them in order to settle any disputes. Indeed, it will be challenging to say that the Prime Minister's directives are binding on the defendants if there is no relationship or privity between the plaintiff and the first defendant. I think it is fair to say that, with all due respect to the Prime Minister's position, I am not in the position to give effect to the Prime Minister's directives regarding matters that neither he nor the government is privy to based on the facts set forth herein. If I were to agree with the plaintiff's suggestion, not only would I be rewriting the contract, but I would also automatically add the first defendant as a party to what would be an imaginary contract between the plaintiff and the first defendant. In this regard, even if there exists an alleged shift in the position taken by the defendants or even an alleged lack of common courtesy on the fourth defendant's part towards the Prime Minister's directive, it still cannot run away from this very fundamental fact that the first defendant does not have the right or the jurisdiction to entertain a request that should never have been entertained in the first place. Essentially, that is all there is to it; any entertainment of the arising issue on the part of the non-parties should be considered a courtesy on their part, as the law prohibits outsiders from agreeing to something that cannot be enforced or does not have legal relevance to them in any way.

[56] To emphasise yet another point, it is also worth mentioning that at the earlier stage of the process, the Prime Minister only noted the words 'untuk pertimbangan' in the appeals made by the plaintiff. It should also be noted that these so-called directives did not only pertain to the fourth defendant but also to two other cabinet ministers who were in charge of Urban Wellbeing, Housing and Local Government over the course of a distinct period of time, as well as to the previous secretary general of the second defendant.

[57] As far as the evidence is concerned, the name of the fourth defendant first appeared on the minutes when, in a letter dated 20 October 2015, the Prime Minister's Political Secretary sent it to him making the following remarks "YBhg, Datuk Mohammad Mentek, untuk dilaksanakan pembayaran harga baru mulai September 2012, seperti syarikat-syarikat

lain'. Pursuant thereto, the fourth defendant chaired a meeting on 3 November 2015 in which the plaintiff's appeals were discussed which resulted in the meeting concluding that any changes to the rate could only be made in 2018 and that there would be no changes to the price rates before that time. It was also stressed by the fourth defendant in that same meeting that the director general of the third defendant had no authority to revise the increase in the rates of the concession agreement and that any changes must be agreed by all parties to agreement. In this sense, it can also be concluded that the fourth defendant has taken some action with regard to this matter.

[58] In furtherance of the foregoing, it is important to emphasise that the fourth defendant was not the only person tasked with making a decision. This is particularly true when, subsequently, the then Minister YB Tan Sri Noh Omar convened a meeting on 29 March 2017 during which it was decided that any request for an increase in the price would have to go to the Cabinet since the plaintiff's services did not fall within the constrained scope of the concession agreement.

[59] As regards the final note from the Prime Minister dated 18 April 2018 which was minuted on the plaintiff's letter dated 30 March 2018 with the following remarks: 'YBhg Datuk Mohammad Mentek, Diluluskan (illegible) harga baru, ikut harga (illegible) syarikat-syarikat lain. Tidak perlu bawa Jemaah Menteri', it appears that before any action could be taken, the parliament has been dissolved in order to pave the way for the upcoming general election. This is the first time that the Prime Minister has said that it is unnecessary for the matter to be brought before the cabinet for its approval. As a result of this, I cannot help but notice that the directive stating that there was no requirement to bring the matter before the Cabinet for approval appears to be in sync with the information provided by the plaintiff in its letter dated 30 March 2018. A directive of this nature did not exist prior to that date.

[60] In further consideration of this issue, there can be no escaping the fact that the plaintiff has been well compensated under the contract that it agreed upon. In light of this finding, I failed to see the existence of an intention on the part of the fourth defendant to intentionally injure the plaintiff through any deliberate and unlawful conduct in the exercise of the fourth defendant's public functions. The plaintiff has failed to show any bad faith or for that matter any outrageous conduct on the fourth defendant's part. There is therefore no element of abuse of a public power by the fourth defendant. Even until after he left, the decision remains the same.

[61] It is further worth noting that despite many directives issued by the Prime Minister and the alleged non-compliance by the fourth defendant, there appears to be no action taken by the government against the fourth

defendant for insubordination and wilful disobedience if it is true that he was acting so outrageously. It is also worth mentioning that it was the Prime Minister who took the view that no cabinet approval is required. In this regard, the position taken by the fourth defendant as a Secretary General did not change even when advising the new Prime Minister, Tun Dr Mahathir bin Mohamad's Principal Private Secretary in the fourth defendant's letter dated 3 May 2019. Even if assuming that there was a delay in handling this matter, it is noteworthy that the stand remained the same. There is no change in the position taken by the fourth defendant in relation to this, or for that matter by the first through third defendants as well.

[62] Having made this decision, it is not necessary for me to specifically address the position of the fifth and sixth defendants. In any event, PW1 acknowledged during the cross-examination by the fifth and sixth defendants' counsel that the fifth and sixth defendants were not the appropriate authorities to consider the price increase and that only the first defendant had the authority to do so. To avoid any doubt, it remains a matter of privity between the parties.

Conclusion

[63] Having deliberated as above, I am bound to dismiss the plaintiff's claim with costs of RM50,000 to the first, second, third and fourth defendants and RM25,000 to the fifth and sixth defendants. All costs are subject to allocatur.